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No. 96-377

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

SARALEE BRAUN, as Administrator of the Estate of Norman Braun, Deceased, and Individually,

Petitioner,

v.

LORILLARD, INC. and HOLLINGSWORTH & VOSE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT LORILLARD, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM S. OHLEMEYER
(Counsel of Record)
ROGER C. GEARY
MARCUS A. MOLLISON
SHOOK, HARDY & BACON, L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
(816) 474-6550
Attorneys for Respondent Lorillard, Inc.

Washington, D.C. • THIEL PRESS • (202) 328-3288

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QUESTIONS PRESENTED FOR REVIEW

1. Whether certiorari is warranted where the District Court excluded the proposed opinion testimony of plaintiff's retained expert who had never before analyzed lung tissue for the presence of asbestos, failed to do any research on the proper method for lung tissue testing, conceded that the method used by his assistant (who had, likewise, never before analyzed lung tissue for the presence of asbestos) was not generally accepted for the intended purpose, and was not involved in any way in the experiment or the analysis which was done by his assistant who was not a witness.

2. Whether certiorari is warranted where the District Court ordered plaintiff to produce the results of plaintiff's destructive testing of decedent's lung tissue, where the tissue tests revealed the absence of the relevant type of asbestos, where the plaintiff previously avoided summary judgment by claiming that lung tissue is not homogeneous because asbestos is not evenly distributed throughout the lung, and where plaintiff voluntarily elected to provide those results to plaintiff's testifying experts and to the jury.

3. Whether certiorari is warranted where the District Court refused to allow plaintiff to elicit hearsay statements of a non-witness, who expressed an opinion regarding causation in a deposition as a retained expert in a different lawsuit, and who was not called as a witness in this lawsuit and thus was not subject to cross-examination.

LIST OF PARTIES

The petitioner is Saralee Braun, as administrator of the Estate of Norman Braun, and individually. The respondents are Lorillard, Inc. and Hollingsworth & Vose Company. Lorillard, Inc. is a corporation owned by Loews Corp., its parent corporation.

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STATEMENT OF THE CASE

Between 1952 and 1956, P. Lorillard, a predecessor of Lorillard, manufactured, distributed, and sold Kent cigarettes with an asbestos-containing filter. (Clerk's Docket No. 192) The filter material that was incorporated into the cigarette filter was sold to P. Lorillard by H&V Specialties Co., Inc., a predecessor of Hollingsworth & Vose. (*Id.*) This filter material contained cotton, crepe paper, cellulose acetate, and a form of asbestos known as crocidolite asbestos. (*Id.*)

On February 15, 1994, the instant lawsuit was filed, alleging that Norman Braun developed mesothelioma, a lung disease, as a result of smoking Kent cigarettes with the asbestos-containg filter. (Clerk's Docket No. 1) Mr. Braun died approximately one year later on February 27, 1995, and his wife Saralee Braun (hereinafter "plaintiff"/"petitioner") filed an Amended Complaint, both individually and as executor of the estate of Norman Braun, seeking recovery for damages resulting from the death of Mr. Braun. (Clerk's Docket No. 87)

Trial began on November 6, 1995, and on December 1, 1995, a unanimous jury verdict was returned in the United States District Court for the Northern District of Illinois (Manning, J.), in favor of defendants Lorillard, Inc. (hereinafter "Lorillard") and Hollingsworth & Vose. (Tr. 3330) Plaintiff appealed the judgment to the United States District Court for the Seventh Circuit which on May 17, 1996, affirmed without dissent the judgment below. *See Braun v. Lorillard, Inc.*, 84 F.3d 230 (7th Cir. 1996) (Posner, C.J.). On June 14, 1996, the Seventh Circuit denied plaintiff's petition for rehearing. Plaintiff's petition for a writ of certiorari was filed with this Court on September 11, 1996.

STATEMENT OF FACTS

Facts material to the questions raised herein include the following:

1. State of the Art and the Kent Filter

Lorillard's evidence regarding the "state of the art" with respect to the use of asbestos in the 1950s included the testimony of Dr. Melvin First, a Professor Emeritus of Environmental Health Engineering at Harvard University. (Tr. 2244) Dr. First, an industrial hygienist who was active in his profession in the 1940s and 1950s, testified that the health risks from asbestos, as known in the 1950s, were related to people who were exposed to gross amounts of asbestos in textile industries and related industries and who dealt with pure asbestos with extremely heavy exposure. (Tr. 2255-2256) Significantly, plaintiff's witness Dr. David Cugell testified that in the 1950s raw asbestos was used for direct implantation into the pericardial sac during a certain form of heart surgery. (Tr. 1377-1378) Dr. Kevin Browne, a specialist in occupational lung disease, was called as a witness by Lorillard and testified that in the 1950s, a surgical procedure was practiced which involved the direct injection of raw asbestos into the pleura, which surrounds the lung. (Tr. 2866-2867)

Asbestos was used extensively in the 1950s for thermal insulation and was also used as the filter material in gas masks. (Tr. 2248-2257) Crocidolite asbestos was also used in hospital air filters and canopies placed over patients' hospital beds. (*Id.*) Regarding the Kent filter, in 1953 the American Medical Association conducted independent testing of filters and filter cigarettes and concluded, in research reported in the *Journal of the American Medical Association,* that the asbestos-contain-

ing filter used in Kent was the most effective in removing tar and nicotine. (Defendant's Ex. 11) Significantly, that research did not criticize the asbestos composition of the Kent filter. This evidence supported Lorillard's position that, in the 1950s, asbestos was considered a "miracle product," and was not considered to cause disease unless an individual had very heavy, regular, and prolonged exposure. (Tr. 3176)

Lorillard discontinued the asbestos filter for Kent in 1956, abandoning a manufacturing process that was inefficient and expensive, produced a cigarette with inferior subjective smoking characteristics, and resulted in a poor-selling cigarette relative to its competitors. (Tr. 1661-68; 2390-2410) Lorillard replaced the asbestos filter for Kent with a new filter that allowed Lorillard to reduce its production cost, reduce the price of the cigarette, and increase the sale of Kent. (Tr. 1686; 2390-2391; 2409; 2411; 2437)

2. Testing of Kent Filtered Cigarettes and Threshold

Lorillard's evidence proved that Kent cigarettes did not release asbestos in its smoke, as Lorillard CEO Dr. Alexander Spears testified regarding documents from 1951 (before Kent went on the market) which reflected testing of Kent cigarettes. (Tr. 2500-2503) That testing demonstrated that no silicate or asbestos was released during the process of smoking Kents. (Tr. 2505-2506) Although plaintiff presented testimony regarding the purported testing of Kent cigarettes by Dr. William Longo of Material Analytical Services ("MAS"), Dr. Longo acknowledged that his second test of Kent cigarettes (which unlike his first test actually involved the use of a standard smoking machine) produced results that were 1/20th of that of the first test. (Tr. 784-

785; 812-813; 840; 955-956) Dr. Kevin Browne, an *occupational lung disease specialist, was the only* witness providing evidence about the issue of "threshold," which is the minimum amount of asbestos exposure necessary to generate a risk of disease. (Tr. 2883) Dr. Browne testified that "five fiber-years" was the probable threshold below which there was no risk of developing mesothelioma (Tr. 2883-2884), and even plaintiff's testifying pulmonologist, Dr. David Cugell, refused to disagree with Dr. Browne's testimony regarding threshold. (Tr. 1395-1397) Significantly, Dr. Browne calculated the threshold at five fiber-years using crocidolite asbestos studies. (Tr. 2883-2884) Even assuming the accuracy of Longo's first test, Dr. Browne concluded that exposure to Kent filtered cigarettes would have generated a fiber-year value of only 0.015, substantially less than the undisputed five-fiber-year threshold of exposure necessary to cause disease. (Tr. 2893-2895) Further, assuming the accuracy of Longo's second test, Dr. Browne testified that such exposure would have generated only a 0.004 fiber-year exposure. (Tr. 2895-2896) Thus, even if one were to rely on Longo's data, such exposure would be insufficient to constitute a risk of disease. (*Id.*)

3. Mr. Braun, Kent Filtered Cigarettes, and Mesothelioma

Norman Braun's testimony (which was admitted into evidence through his deposition) established a substantial question about whether Mr. Braun actually smoked Kent cigarettes between 1952 and 1956, because Mr. Braun's memory was incorrect with respect to several objective characteristics of the Kent cigarettes he claimed to have smoked. (Tr. 2175; 3186)

Mesothelioma of the lung is a disease involving the formation of a malignancy of the pleura, which is the

outside surface lining of the lung. (Tr. 1155) Although mesothelioma is often associated with heavy asbestos exposure, approximately 20% of mesothelioma cases in the United States are not associated with asbestos and involve patients with no asbestos exposure. (Tr. 2867-2871) Mr. Braun demonstrated no objective indications typically observed in cases of mesothelioma associated with exposure to asbestos, such as the presence of bilateral pleural plaques, diffused interstitial fibrosis, asbestos bodies, or uncoated asbestos fibers. (Tr. 2891-2893) Accordingly, and for the reasons previously described, Dr. Browne testified that Mr. Braun's mesothelioma was not caused by exposure to asbestos. (*Id.*)

4. Tissue Testing by Dr. Roggli, MAS, and Dr. Pooley

All types of asbestos fibers, including crocidolite, can be found in the ambient environment, as well as in the lungs of people not occupationally exposed to asbestos. (Tr. 2589-2592; 2318-2319) Significantly, no witness testified that any crocidolite asbestos was found in Mr. Braun's lung, which was tested not only by Dr. Frederick Pooley, an expert retained by Lorillard, but also by Dr. Victor Roggli and MAS, experts retained by plaintiff. None of these witnesses detected any crocidolite in their testing. (Tr. 2640; 2654; 797-798) The procedure that resulted in that testing follows.

On March 7, 1995, plaintiff's counsel announced their plan to conduct destructive testing on lung tissue taken from Mr. Braun during autopsy. In response, defendants filed a motion to stay the destructive testing which was granted by the District Court. (Clerk's Docket No. 189) After the District Court approved a protocol to be followed by the parties in conducting such a test, the plaintiff and defendants received specimens of Mr. Braun's

lung tissue pursuant to the District Court Order. (Clerk's Docket No. 99) Defendants received "duplicate" lung tissue specimen (adjacent samples taken from specified locations) on or about July 24, 1995, and sent that tissue to Dr. Frederick Pooley, a Professor of Minerals at the University of Wales. (Clerk's Docket No. 163) Pursuant to the protocol established in the District Court's order, Dr. Pooley conducted a quantitative and qualitative analysis of the mineral dust contained in the lung tissue specimens. Dr. Pooley's analysis detected the presence of chrysotile, tremolite, and amosite asbestos fibers. (Tr. 2641) No crocidolite asbestos (the type used in the Kent filter) was found in Norman Braun's lung tissue. (Tr. 2634) Defendants produced Dr. Pooley's report of findings and test results to the plaintiff. (Clerk's Docket No. 189)

The plaintiff also tested Mr. Braun's lung tissue for the presence of asbestos fibers but thereafter refused to produce the results of plaintiff's testing. (Clerk's Docket No. 202) Defendants filed a motion to compel the production of that evidence and, after extensive briefing and argument, the District Court granted defendants' motion, finding that the "non-homogeneous" nature of the lung tissue was an "exceptional circumstance" warranting production pursuant to Fed. R. Civ. P. 26. (Petitioner's Appendix, pp. A15-A20)

On appeal, the Seventh Circuit affirmed the District Court's rulings regarding defendants' discovery of plaintiff's tissue-testing results, noting that although plaintiff initially claimed the testing would be reliable because uniform samples were available,

> [l]ater the plaintiffs' lawyers changed their tune. No longer did they suggest that crocidolite fibers if present would be uniformly distributed, for they

> wanted to protect themselves from an inference that negative *test results* on the tissue samples tested by the defendant's experts (who found no crocidolite fibers) would imply the absence of fibers throughout Braun's lungs. The change of position hampered the defense, which could not conduct its own tests on tissues that had been destroyed in the course of the plaintiff's tests. The only way the defense could find out whether there were crocidolite asbestos fibers in the tissues that the plaintiff's expert had tested was to get the test results.

84 F.3d at 236.

As a result of the District Court's ruling, the defendants discovered that eight tissue samples were sent to Dr. Victor Roggli of the Department of Pathology at Duke University for fiber burden analysis. (A22) Dr. Roggli used the bleach digestion method of sample preparation, and like Dr. Pooley, found the presence of chrysotile, tremolite and amosite asbestos in Mr. Braun's lung tissue. (Tr. 2654) Also like Dr. Pooley, Dr. Roggli found no crocidolite asbestos in Mr. Braun's lung tissue. (Tr. 407) At the request of the plaintiff, Dr. Roggli sent the remaining lung tissue to Dr. Longo, another "expert" retained by plaintiff, for fiber burden analysis. (Tr. 841) Dr. Longo's laboratory, MAS, analyzed Mr. Braun's lung tissue specimens and, like Dr. Pooley and Dr. Roggli, found no crocidolite asbestos fibers. (*Id.*)

Petitioner tries to obfuscate the significance of the Roggli and MAS testing by suggesting no crocidolite was found because of the "small size of the sample," the type of microscope used, a flaw in the method of tissue preparation, and/or the use of low rather than high magnification. (Petition for cert., pp. 4-5) This unusual self-criticism of methods and choices made by plaintiff and her retained expert(s) is nothing more than a disingen-

uous attempt to explain away testing results that were incompatible with plaintiff's litigation objectives. Had the results of the testing been reversed, so would have the criticism.

In addition, petitioner claims that defendant's expert, Dr. Pooley, did not examine a sufficient portion of Mr. Braun's lung to support his conclusion and mischaracterizes the technique used by Dr. Pooley, who has used the transmission electron microscope on a regular basis for thirty years. (Tr. 2578) During that time, Dr. Pooley has typically examined 1,000-2,000 specimens of lung tissue per year and routinely examines specimens for asbestos. (Tr. 2579-2581) In analyzing samples from Mr. Braun's lung, Dr. Pooley examined an appropriate portion of each of the eight separate specimens that were provided; which were taken from a sufficient number of locations within the lung. (Tr. 2623-2625) Dr. Pooley's analysis used approximately four percent of the lung, more than the amount he typically used. (Tr. 2735) Dr. Pooley then took a second sample of each tissue specimen and repeated his analysis. (Tr. 2626) As a result, Dr. Pooley actually examined seven to eight grams of tissue (Tr. 2735), approximately *eight times* the amount necessary to conduct a reliable tissue analysis. (Tr. 2612) Dr. Pooley actually found and identified over 1,500 mineral fibers (Tr. 2639), and of that amount, 8% were asbestos fibers but none were crocidolite asbestos. (Tr. 2640) Significantly, petitioner's criticism of Dr. Pooley was not expressed at trial, as plaintiff did not object to the foundation for Dr. Pooley's testimony.

5. The Experiment by Dr. Schwartz's Assistant

Following the adverse results of the Roggli/MAS tissue analysis, counsel for plaintiff asked Dr. Schwartz to per-

form a third test of Mr. Braun's lung tissue for the presence of crocidolite fibers. (Tr. 1017) Dr. Schwartz is the President of Stat Analysis, an environmental testing laboratory which is accredited, contrary to plaintiff's suggestion, to analyze only building materials and air samples for the presence of asbestos and other fibers. (T. 1005) Prior to this episode, Dr. Schwartz and his lab had never previously examined lung tissues for asbestos. (Tr. 1010; 1021; 1051) At trial, plaintiff called Dr. Schwartz as a witness for the purpose of testifying that his lab assistant found what the lab assitant believed were two crocidolite fibers (allegedly found in only one of the eight speciments tested). (Tr. 1032-1035) Before this line of testimony was elicited, however, the District Court allowed the defendants to voir dire Dr. Schwartz about his lack of qualifications, methodology, and first-hand knowledge. That voir dire examination established that plaintiff's counsel directed Dr. Schwartz to utilize a procedure to analyze tissue speciments in a "different way," than routinely used methodologies. (Tr. 1053) Plaintiff claims that Dr. Schwartz "was asked by counsel about the different ways one might prepare the sample for fiber burden analysis without dealing with tissue sections or other more routinely prepared methodology." (Petition for cert. p. 7) This is less than accurate, as Dr. Schwartz in fact testified as follows:

> Q. [by defense counsel]: Well, didn't [plaintiff's counsel] specifically ask you how you would do this if you had to do it in a different procedure when you don't deal with tissue sections or other more routinely prepared methodology?
>
> A. Yes, I believe so.

(Tr. 1053) (Respondent Lorillard's Appendix, p. 2a) In addition, Dr. Schwartz testified that plaintiff's counsel

requested Dr. Schwartz to " 'maximize' the chance of finding that type of fiber." (Tr. 1017) Dr. Schwartz complied with this request, without conducting any research, and decided to analyze Mr. Braun's lung tissue using the only procedure he knew – a "high temperature" ashing procedure that involves incinerating the organic portion of the material, leaving inorganic fibrous material for examination. (*Id.*) Acid was also used to destroy the organic tissue in combination with the application of high temperature. (Tr. 1055) Dr. Schwartz testified on voir dire that the use of high temperature and acid in combination, as was done here, can alter the chemistry of asbestos fibers. (*Id.*)[1] Dr. Schwartz also conceded that "high temperature" ashing should not be used if the material to be destroyed is expected to contain a small number of fibers. (*Id.*)

Dr. Schwartz admitted on voir dire that he was not personally involved in the "ashing" experiment, as he was out of town while his assistant conducted the experiment on the lung tissue. (Tr. 1051) Prior to his assistant's experiment, Dr. Schwartz failed to consult any resource or any other expert in the field to inquire about the appropriate protocol or methodology to be used when conducting tissue preparation. (Tr. 1052) Dr. Schwartz never previously examined lung tissue for asbestos content, nor had he ever previously taken lung tissue specimens and prepared them for microscopic analysis. (Tr. 1051) Dr. Schwartz was not able to identify any articles or scientific literature discussing the fiber burden analysis

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[1]The chemistry of asbestos fibers is particularly significant because analysis of a particular fiber's chemistry is the only way that a particular type of asbestos, such a crocidolite, can be distinguished from other asbestos types. (Tr. 1019)

of lung tissue nor was he able to identify any researcher who has published articles on that subject. (Tr. 1021) Moreover, his assistant had never previously analyzed lung tissue. (Tr. 1052) Dr. Schwartz did not personally examine the lung tissue in this case, instead, he simply relied on the reports of his assistant. (Tr. 1113)

Dr. Schwartz was unaware that bleach digestion and low temperature plasma ashing are the methods customarily used for preparing lung tissue for fiber burden analysis. (Tr. 1065-1066) Dr. Schwartz conceded on voir dire that the "high temperature" ashing experiment was not consistent with any approved methodology for the examination of organic tissue. (Tr. 1064-1066) Dr. Schwartz also admitted that "high temperature" ashing was not a method customarily relied on by experts to do fiber burden analysis on lungs. (Tr. 1066) Dr. Schwartz was unaware of any established methods for preparing lung tissue for TEM analysis. (Tr. 1064) Following the voir dire examination (1a-7a), the District Court sustained the defendants' objection that Dr. Schwartz's opinions lacked foundation, finding on the record that Dr. Schwartz "knows absolutely nothing about analyzing lung tissue and asbestos fibers." (Tr. 1073) (7a)

6. The Testimony of Dr. Cugell

Dr. David Cugell, a pulmonologist, was called as a witness at trial by plaintiffs for the purpose of expressing his opinion that asbestos from the Kent filter could cause mesothelioma and did cause Mr. Braun's mesothelioma. In forming his opinions, Dr. Cugell claimed that he relied on the "statements" of a non-witness, Dr. Andrew Churg. (Tr. 1325-1326) (7a-9a)

Prior to the testimony of Dr. Cugell, the defendants advised the District Court that Dr. Cugell intended to

inform the jury that he was relying on the opinions contained in the deposition testimony of Dr. Churg, who was retained by plaintiff's counsel as an expert witness in another case, *Ierardi v. Lorillard, Inc.*, Case No. 90-7049 (E.D. Pa. 1991). In that case, Dr. Churg assumed that Mr. Ierardi actually smoked Kent cigarettes and opined that Mr. Ierardi's mesothelioma was caused by the Kent filter; the jury in *Ierardi*, however, returned a defense verdict specifically rejecting the assumption by Dr. Churg, finding that Mr. Ierardi did not actually smoke Kent cigarettes with the asbestos filter. (Tr. 1271) Plaintiff's counsel conceded that Dr. Churg had not published any written work on the subject of Kent filters. (Tr. 1274) Over the objection of the defendants, the District Court allowed Dr. Cugell to testify, without reference to the prior litigation, that the "statements"of Dr. Churg formed the basis of his opinion. (Tr. 1325-1328) (8a-9a)

Dr. Cugell testified on cross-examination that he believed Dr. Churg was an authority on "asbestos diseases, fiber types and potential of fiber types to cause diseases." (Tr. 1370) Later on cross-examination, Dr. Cugell responded to a question about background levels of asbestos by injecting into nis testimony a reference to Dr. Churg's "textbook." (Tr. 1391-1392) Following Dr. Cugell's reference to Dr. Churg's text, cross-examination followed with respect to Churg's writings about environmental sources of asbestos and threshold issues. (Tr. 1397-1403) (10a-12a)

On redirect examination, plaintiff then again attempted to elicit from Dr. Cugell the substance of Dr. Churg's litigation opinions. (Tr. 1430) The defendants objected, claiming that litigation testimony, in the form of opinions by a non-witness, is not an appropriate basis for expert testimony, nor did it fall within a recognized

exception to the "hearsay" rule embodied in Fed. R. Evid. 803-804. (Tr. 1430-36) On voir dire by the defendants, Dr. Cugell conceded that deposition testimony by a hired expert is not the type of informatin relied on by physicians in their profession. (Tr. 1439) The District Court then sustained the defense objection, finding that Dr. Cugell's deposition testimony was inadmissible hearsay. (Tr. 1444) In addition, the District Court specifically found that, under Fed. R. Evid. 403, the prejudicial effect of Dr. Churg's litigation testimony outweighed its purported probative value. (*Id.*) (13a-14a)

In response to plaintiff's complaints that plaintiff was entitled to inform the jury that Dr. Cugell's causation opinion was based on the work of Dr. Churg, the District Court allowed plaintiff to elicit from Dr. Cugell on redirect examination that he "did utilize Dr. Churg's opinion or statement." (Tr. 1444; 1450) (13a-14a)

SUMMARY OF THE ARGUMENT

None of the claims made in this petition for a writ of certiorari are sufficient to warrant review within the meaning of Rule 10 of the Rules of the Supreme Court. Rule 10 provides that a "petition for a writ of certiorari will be granted only for compelling reasons." Here, all of the rulings of the District Court are to be reviewed under the abuse of discretion standard, and that standard has not been violated. The decision of the Seventh Circuit is in no way in conflict with the decisions of other circuits or this Court. At most, petitioner is claiming the lower courts misapplied the law. As provided in Rule 10, however, certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Certiorari should not be granted here.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY REFUSED TO ALLOW DR. SCHWARTZ TO TESTIFY REGARDING AN EXPERIMENT HE DID NOT CONDUCT, WHICH WAS NOT CONSISTENT WITH ANY APPROVED METHODOLOGY, AND WHICH INVOLVED AN AREA OF SCIENCE ABOUT WHICH HE HAD NO KNOWLEDGE.

Simply stated, Dr. Schwartz was not an expert with respect to lung tissue testing for asbestos content because he knew nothing about the subject. Moreover, not only did Dr. Schwartz have no personal involvement in the "ashing" experiment supposedly performed by a non-witness but Dr. Schwartz also conceded that the experiment was *not* consistent with any published or approved methodology for the examination of organic tissue. Dr. Schwartz knew nothing of tissue analysis before this case and did nothing to educate himself about tissue analysis during this case. Plaintiffs unsupported denials notwithstanding, Dr. Schwartz candidly stated he was hired by plaintiff's counsel to examine the lung tissue in a "different way," a method ultimately resulting in his total lack of participation in an experiment that produced no photographs, data, or material evidence regarding its "results." Such testimony was plainly inadmissible pursuant to Fed. R. Evid. 702 and 703. The Seventh Circuit succinctly criticized plaintiff's attempted use of Dr. Schwartz as follows:

> The fact that the plaintiffs' lawyer turned to this nonexpert, having already consulted experts without obtaining any useful evidence, is suggestive of the abuse, or one of the abuses, at which *Daubert* and its sequelae are aimed. That abuse is the hiring of reputable scientists, impressively credentialed, to

testify for a fee to propositions that they have not arrived at through the methods that they use when they are doing their regular professional work rather than being paid to give an opinion helpful to one side in a lawsuit.

84 F.3d at 235.

A. The "High Temperature" Ashing Procedure

The generally accepted techniques for preparing lung tissue for fiber analysis are bleach digestion and low temperature plasma ashing. (Tr. 2615; 2736) Dr. Frederick Pooley, an expert in fiber burden analysis of lung tissue, testified "there is only one form of plasma ashing, and that's low temperature." (Tr. 2736) Petitioner implies that the EPA protocol somehow applies to lung tissues analysis – it does not, as it applies to the analysis of *building materials.* (Tr. 1045) There was, however, no evidence in this case that the "high temperature" ashing procedure used by Dr. Schwartz's assistant has ever been approved by any entity or expert for the scientific analysis of human or animal tissue. On the contrary, in response to questioning at trial by *plaintiff's* counsel, Dr. Schwartz testified as follows:

Q. How common is it to use the ashing procedure to prepare material for examination under transmission electron microscope to look for asbestos?

A. Okay. *That is not very usual to do.* (emphasis added)

THE COURT: That is not what?

THE WITNESS: Usual.

Q. [by plaintiff's counsel] Not usual with regard to lung tissue or with regard to materials in general?

A. With regard to materials in general. It's not a routine procedure.

(Tr. 1044) Dr. Schwartz proceeded to explain that the EPA protocol approves "ashing" to analyze building materials such as ceiling tiles and asbestos insulation. (Tr. 1045; 1053) On cross-examination, Dr. Schwartz admitted that to his knowledge "ashing" was *not* a method customarily relied on by experts to do fiber burden analysis on lungs. (Tr. 1066) In fact, Dr. Schwartz was unaware of *any* established methods for preparing lung tissue for TEM analysis. (Tr. 1064) Significantly, Dr. Schwartz acknowledged that his assistant used acid on the lung tissue as part of the "ashing" process, and that high temperatures and acid can affect the chemistry of asbestos and other minerals. (Tr. 1055) Dr. Schwartz also conceded that this process of "ashing" asbestos can break fibers, thereby increasing the number of fibers detected under the microscope. (Tr. 1053-1054)

B. The Lack of Scientific Knowledge and the Non-participation of Dr. Schwartz Regarding Mr. Lov's Experiment

Dr. Schwartz was not present and, indeed, was out of town while his assistant, Mr. Lov, was conducting this experiment on the lung tissue. (Tr. 1051) Dr. Schwartz failed to consult any resources or any other expert in this field to inquire about the appropriate protocol or methodology to be used when conducting tissue preparation. (Tr. 1052) Significantly, Dr. Schwartz could not identify any author or title of any publication concerning analyses used to determine or measure the distribution of asbestos in lung tissue. (Tr. 1021) Petitioner asserts Dr. Schwartz based his "opinion" on Mr. Lov's observations and his "worksheets." (Petition for cert., p. 9) Petitioner did not, however, also state that Mr. Lov's worksheet indicated that no crocidolite was found in seven of the eight specimens he tested, and that Mr. Lov characterized as "prob-

lems" his observations that the "presence of the crocidolite fibers seem to be isolated. I am unable to find them in the other samples or more of them in sample #1/ Braun." (Exhibit 1 to Deposition of Dr. Schwartz, and Depo. pp. 60-62) According to Dr. Schwartz, Mr. Lov "presumed he should have seen [crocidolite] in all samples." (*Id.* at p. 62) Although Mr. Lov had the equipment to take photomicrographs [pictures of the magnified images seen through an electron microscope] of the specimens, he did not. (*Id.* at p. 60) Not coincidentally, although plaintiff could have called Mr. Lov as a witness, she did not.

Dr. Schwartz's lack of diligence is compelling, especially in light of his admitted and complete absence of experience in the area of scientific tissue analysis. Dr. Schwartz admitted to the District Court at trial that: he had *never* previously examined lung tissue for asbestos content; he had *never* previously taken lung tissue specimens and prepared them, or even instructed anyone else how to prepare such tissue for microscopic analysis; his assistant, Mr. Lov, had *not* previously analyzed lung tissue; and Dr. Schwartz had *not* personally examined the lung tissue in this case. Instead, he relied on the actions and hearsay reports of Mr. Lov. (Tr. 1051-1052; 1113) Dr. Schwartz was not prepared to conduct his experiment, perhaps in part because he was identified as an expert[2] on the eve of trial in an effort to defeat the defendants' motion for summary judgment. Plaintiff's claim (Petition for cert., p. 22) that the defense did not

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[2] Dr. Schwartz was not listed as a witness for plaintiff in compliance with the pretrial order, and the defendants objected on that basis. (Defendants' Reply in Support of Motion for Summary Judgment) In response, plaintiff improperly characterized Dr. Schwartz as a "rebuttal" witness. (*Id.*)

"try to refute" Mr. Lov's experiment is disingenuous and disregards the late disclosure of Dr. Schwartz.

Based on Dr. Schwartz's testimony and the holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the District Court[3] had no choice but to exclude his testimony regarding Mr. Lov's "ashing" experiment, and found that:

> [Dr. Schwartz] testified that he really didn't have any knowledge of the methodology that should be employed, and he still doesn't have any information regarding the methodology that should be employed with respect to lung tissue. Seems to me this witness knows absolutely nothing about analyzing lung tissue and asbestos fibers . . . And additionally he acknowledged that the methodology that he used – he just – he has no answers. He didn't know one way or the other.

(Tr. 1073) (7a) The Seventh Circuit agreed and specifically expressed its disapproval of Dr. Schwartz's non-involvement in such a novel procedure:

> [B]ut relying on the lab assistant's purely oral report, which is not fine given the novelty of the procedure. He speculates that his method is perfectly transferable from building materials to human tissues. Since he has never done any testing of those tissues, his speculations lack the authority of science.

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[3] In her petition for a writ of certiorari, petitioner wrongly claims the District Court "accepted" Dr. Schwartz's scientific expertise." (p. 11) On the contrary, the District Court's earlier comments were made in denying defendants' motion for summary judgment on the basis that material facts were in dispute. (A34) Significantly, in that ruling the District Court stated that "[t]his Court's preliminary determination may be modified depending on the testimony Dr. Schwartz offers at trial." (A32) Such was the case.

84 F.3d at 235. Contrary to petitioner's suggestion, these criticisms of Dr. Schwartz bear directly on the lack of foundation for his opinion, and not merely on his lack of credibility.

C. Petitioner Wrongly Suggests the Impossibility of a "False Positive"

Petitioner argues for the validity of Mr. Lov's experiment by claiming that a "false positive" (i.e., an incorrect finding of crocidolite) was not possible. This assertion is specious. First, the person who actually conducted the experiment, and formed the opinion that crocidolite was present, was not before the Court as a witness subject to cross-examination. Simply stated, Mr. Lov may have been wrong. Second, the use of acid in "high temperature" ashing admittedly affects the chemistry of the resulting product. (Tr. 1055) As a result, it was not possible, for Mr. Lov or Dr. Schwartz, to classify fiber types with any degree of scientific certainty because such a determination must be made on the basis of the apparent chemistry of the mineral specimen. (Tr. 1019) Third, because Dr. Schwartz did not personally participate or even direct the protocols of this experiment, he could not testify to the use of any scientific controls that were necessary to rule out the presence of any environmental or "background" asbestos. Because crocidolite asbestos can be found in the ambient environment, scientific controls are necessary to eliminate the possibility of the environment as a source of a "positive" finding. Because there was no evidence of any such controls, it cannot be claimed, as plaintiff does, that a "false positive" was not possible.

The Seventh Circuit expressly rejected petitioner's claim that an error, by Dr. Schwartz and his assistant, was not possible:

> The altered chemistry might affect the spectrographic profile of any fibers found in the residue – might alter the "appearance" of the fibers so that it was impossible to tell whether they were crocidolite fibers or some other type of asbestos fiber.

84 F.3d at 234.

D. The District Court and the Seventh Circuit Did Not Misapply *Daubert*

Petitioner severely distorts the significance of the decision in *Daubert*. Although this Court held that "general acceptance" is not a necessary precondition to the admissibility of scientific evidence, this Court specifically retained general acceptance as an important factor to consider in determining admissibility. 113 S.Ct. at 2797. Moreover, this Court specifically noted that the trial judge must first determine "whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue." *Id.* at 2796.

According to *Daubert*, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 2795. *Daubert* defined the language of Fed. R. Evid. 702 by stating that the "adjective 'scientific' implies a grounding of the methods and procedures of science. Similarly, the word 'knowledge' connotes more than subjective belief of unsupported speculation." *Id.* As further stated in *Daubert:*

> in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific

> method. Proposed testimony must be supported by appropriate validation – i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertained to 'scientific knowledge' establishes a standard of evidentiary liability.

Id.

Among the factors articulated in *Daubert* for purposes of evaluating an expert's qualifications are the following: (1) whether the theory or technique can and has been tested; (2) whether the theory or technique has been subject to peer review and publication; (3) a determination of the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; and (5) general acceptance. *Id.* at 2797. *Daubert* specifically noted that "wide-spread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique that has been able to attract only minimal support within the community,' (cite omitted) may properly be viewed as skepticism." *Id.*

Such is the case here. Not only was there no evidence of "general acceptance" for Mr. Lov's experiment, but there was also absolutely no evidence of prior or subsequent testing for purposes of validation, no evidence that the experiment has been subject to peer review and publication, no evidence of a known or potential rate of error, and no evidence of any standard whatsoever controlling the operation of the "technique." Plaintiff presented no evidence that anyone has ever conducted a fiber burden analysis on human tissue using "high temperature" ashing, except Mr. Lov.

In a case that has special significance to the instant case, the Ninth Circuit Court of Appeals (following the remand of *Daubert*) held that an important consideration

in determining whether proposed expert testimony amounts to "good science" is whether the proposed expert conducted the research independent of litigation or whether the expert developed the opinion expressly for the purpse of testifying. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995). Here, plaintiff wanted the lung tissue analyzed in a "different way," to "maximize" the results, and Dr. Schwartz thus did not consult any authorities or written materials as part of the experiment. It is clear that plaintiff wanted the experiment to produce results, without regard for the method, the means, or the scientific parameters that should have been involved. The experiment by Mr. Lov certainly was not the subject of "a general agreement of scientists in the field," and accordingly the Seventh Circuit's decision below was not in conflict with *Daubert, United States v. Bonds*, 12 F.3d 540 (6th Cir. 1993), or the decision of any other court. Petitioner's argument to the contrary is without merit.

The District Court has "great discretion" in the admission of expert testimony, and the Court of Appeals reviews such determinations only for an abuse of that discretion. *Matter of Sheridan*, 57 F.3d 627, 634 (7th Cir. 1995). Certiorari review is not warranted.

II.

THE DISTRICT COURT PROPERLY ORDERED DISCOVERY OF PLAINTIFF'S TISSUE-TESTING RESULTS AND CORRECTLY ALLOWED DEFENDANTS TO USE THE RESULTS AT TRIAL.

A. Exceptional Circumstances Required the Production of Plaintiff's Destructive Testing Which Showed the Absence of Crocidolite Asbestos in Mr. Braun's Lung

Plaintiff's "conflicting" views on the uniformity of lung tissue simply depend on plaintiff's objectives. In an

effort to convince the District Court to grant its request for tissue testing, plaintiff represented to the District Court that "plaintiff's position is that the tissue is not unique, since only a representative sample would be destroyed and a majority of tissue would be preserved." (Plaintiff's Motion to Vacate Temporary Stay of Tissue Testing) At that time, plaintiff told the court: "[lung] tissue, as far as I know, is lung tissue." (Tr. 3, Hearing of March 16, 1995) Later, in opposing the defendants' motion for summary judgment (based on Dr. Pooley's finding that no crocidolite was present in the specimens he analyzed), plaintiff took the opposite view, claiming the lung tissue was not fungible: "Not detecting crocidolite asbestos fibers in a sample and concluding that there are no such fibers in his entire lung are completely different." (Clerk's Docket No. 170, Plaintiff's Response to Defendants' Motion for Summary Judgment, p. 5) Plaintiff persisted in this non-uniformity theory at trial, as Dr. Schwartz testified for plaintiff that it was his position that asbestos fibers are distributed unevenly in the lung, and that asbestos tends to localize in the lung in an unpredictable manner. (Tr. 1022-1023) Notwithstanding these assertions, petitioner now insists that "both sides had equal samples of lung tissue and had an opportunity to discover equivalent information about the lung tissue." (Petition for cert., p. 17)

In granting the defendants' motion to compel evidence of the Roggli and MAS test results procured by plaintiff, the District Court specifically noted that "Dr. Schwartz testified that 'portions of the lung vary in density and therefore would vary in dry weight, because lung is not a homogeneous tissue.' " (A19) The District Court concluded that

> since portions of the lung vary in density and the lung is not a homogenous tissue, in the instant case,

> there is a showing of exceptional circumstances. Asbestos is not uniformly disbursed throughout the lung; each sample is unique thereby making each analysis unique.

(A19-A20) In addition, the District Court concluded that the defendants could not possibly seek "substantially equivalent" discovery because

> alternative methods were used to analyze Mr. Braun's lung tissue for asbestos and results varied based upon methodology . . . Thus, in the instant case, it is impractical for the party seeking discovery to obtain facts or opinions on the same subject or equivalent informatin by other means, since the plaintiffs were given 8 different samples of lung tissue from the left and upper and lower lobe to analyze and defendants were given 8 similar samples of lung tissue from the left and upper and lower lobe to analyze.

(A20) A District Court's pretrial discovery rulings are reviewed under a clear abuse of discretion standard. *Rennie v. Dalton,* 3 F.3d 1100 (7th Cir. 1993). In a case similar to the instant case, the District Court in *Coates v. AC&S, Inc.,* 133 F.R.D. 109 (E.D. La. 1990) held that the potential for "shopping" tissue samples to experts to determine the cause of mesothelioma was an "exceptional circumstance" under Rule 26(b)(4)(B) justifying discovery. *Id.* at 110. As stated by the District Court in *Coates:*

> Considering the difficulty in diagnosing mesothelioma, the fact finder is entitled to know the extent of any disagreement of those whom a plaintiff or defendant has employed, unless we adopt this theory that in a civil case, as part of its trial tactics, a party has the right to suppress the truth.

Id. at 111. In addition, plaintiff's testifying experts actually reviewed the results of plaintiff's tissue testing. As a result, the production of these results was required to allow for proper cross-examination of those experts, *regardless* of whether such results were relied on by the expert. *See Eliason v. Hamilton,* 111 F.R.D. 396 (N.D. Ill. 1986) (emphasis added). In *Eliason,* the District Court expressly refused to limit discovery to matters relied on by the testifying expert, stating that

> documents considered but rejected by the expert trial witness could be even more important for cross-examination than those actually relied upon by him.

111 F.R.D. at 400 n.5. Thus, the District Court properly ordered production of plaintiff's tissue-testing results: (1) because of the presence of exceptional circumstances; and (2) to allow for proper cross-examination of plaintiff's testifying experts. Petitioner has not and cannot make any showing of "abuse of discretion" with respect to this issue.

B. Defendants Were Properly Allowed to Make Use of Plaintiff's Test Results

Petitioner complains that "[a] t trial, the jury was told of Roggli's and MAS's results." (Petition for cert. p. 6) Petitioner fails to mention, however, that the jury was first informed of these results by *plaintiff's counsel* in opening statements, as counsel expressly referred to and attempted to explain away the testing done by Dr. Roggli and MAS. (Tr. 407-409)

On plaintiff's direct examination of Dr. Schwartz, plaintiff elicited testimony from Dr. Schwartz to the effect that Dr. Schwartz had been made aware, by plain-

tiff's counsel, of both the Roggli test results and the MAS test results, and that he believed them to be inconclusive. (Tr. 1068-1070) Similarly, on direct examination of plaintiff's testifying expert, Dr. Longo, plaintiff's counsel asked Dr. Longo to try to explain why his laboratory (MAS) tried to but could not detective any crocidolite asbestos in the lung tissue samples examined. (Tr. 720-724) Likewise, plaintiff's expert Dr. Cugell acknowledged on cross-examination that plaintiff's counsel informed him of Dr. Roggli's testing. (Tr. 1405-1406)

Because plaintiff made the test results available to plaintiff's testifying experts, the District Court found that such results were discoverable by the defendants for purposes of cross-examining expert witnesses. (Tr. 334) *See Eliason, supra.* Furthermore, plaintiff's use of such results, in opening statement *and* in direct examination of Dr. Longo and Dr. Schwartz, precludes plaintiff from now claiming the defendants could not use the same evidence. Plaintiff elected to send the Roggli report to its own testifying experts, thereby removing the report from any protection under Rule 26(b)(4)(B). *See Heitmann v. Concrete Pipe Machinery,* 98 F.R.D. 740, 743 (E.D. Mo. 1983).

A District Court's evidentiary rulings will not be reversed absent a clear abuse of discretion. *Stuart Park Assocs. v. American Pension Trust,* 51 F.3d 1319, 1327 (7th Cir. 1995). Petitioner fails to make any showing of "abuse of discretion" regarding the use by defendants of plaintiff's testing and fails to make a plausible claim for certiorari review.

III.

THE PLAINTIFF DID NOT HAVE A "SUBSTANTIAL RIGHT" TO INTRODUCE INTO EVIDENCE THE HEARSAY LITIGATION TESTIMONY BY A RETAINED EXPERT WITNESS IN A DIFFERENT CASE WHO DID NOT TESTIFY IN THIS CASE.

A. Defendants' Cross-Examination of Dr. Cugell Was Not Improper

Dr. Churg has never written on the subject of the Kent filter, and his medical textbook *The Lung* does not state whether or not Dr. Churg believes asbestos in a cigarette filter can cause mesothelioma. Defendants were entitled to cross-examine Dr. Cugell about whether he agreed with the propositions in Dr. Churg's textbook because (a) Dr. Cugell acknowledged Dr. Churg was an authority on lung disease; and (b) Dr. Cugell injected the book by first referring to it in answering a prior question by defense counsel that made no reference to Dr. Churg or his book. The questions asked of Dr. Cugell about Dr. Churg's textbook were nothing more than traditional cross-examination of an expert, and did not expressly or implicitly suggest that Dr. Churg had any views on the subject of the Kent filter.

The rule advocated by petitioner would necessarily either insulate its expert from cross-examination based on authoritative texts or allow its expert to recite without limitation the opinions by other hired experts in other cases. Such a rule simply should not be recognized by this Court.

B. The Alleged "Error" by the District Court Was Not Prejudicial Because Plaintiff Was Not Deprived of Any "Substantial Right"

The exclusion by the District Court of the litigation testimony of Dr. Churg in *Ierardi* did not deprive plaintiff of any "substantial right" under the harmless error rule as stated by this Court in *Kotteakos v. United States,* 328 U.S. 750, 767 (1946). The hearsay statement plaintiff attempted to admit involved testimony provided by Dr. Churg in his capacity as a retained expert in a different lawsuit which had been tried five years previously. (Tr. 1431; 1434) Dr. Churg's controverted deposition testimony in that case was part of separate litigation, involving different circumstances and an unrelated plaintiff. (Tr. 1433-1434) Moreover, his opinions were not contained in a medical journal or in peer-reviewed scientific liteature. (*Id.*) The District Court properly refused to allow plaintiff to introduce this inadmissible hearsay and to thereby circumvent the rules governing identification, disclosure, and discovery of expert opinion.

Plaintiff had no "right" to inject the hearsay opinions of Dr. Churg. An expert witness is entitled to rely on hearsay to supports his opinion only to the extent that such evidence is of a type reasonably relied upon by other experts in the field. *Baumholser v. Amax Coal Co.,* 630 F.2d 550, 553 (7th Cir. 1980). *See* Fed. R. Evid. 703. Even Dr. Cugell agreed physicians do not rely on depositions in making a diagnosis. Moreover, an expert witness may not testify that other experts, not present in the courtroom, corroborate his views. *United States v. Grey Bear,* 883 F.2d 1382, 1392-93 (8th Cir. 1989). *See United States v. Tran Trong Cuong,* 18 F.3d 1132, 1143 (4th Cir. 1994) (hearsay statements made for litigation not a proper basis for expert opinion).

Moreover, the District Court allowed plaintiff to cure any "prejudice" by allowing Dr. Cugell to testify that he based his causation opinion on the statements of Dr. Churg. There is simply no merit to plaintiff's claim that she had a "substantial right" to bootstrap the litigation opinion testimony of a non-witness into this case.

C. The District Court's Rule 403 Determination.

In addition, the District Court also excluded Dr. Churg's deposition testimony on the ground that, under Fed. R. Evid. 403, the prejudicial effect on the defendants of admitting such testimony outweighed any probative value to plaintiff of such testimony. (Tr. 1444) Such a determination, under Rule 403, is especially directed to the District Court's discretion. *Berry v. Deloney,* 28 F.3d 604, 608 (7th Cir. 1994). That ruling underscores the fact that defendants' cross-examination of Dr. Cugell, if at all "misleading," was of such a minimal nature so as to be insufficient to justify the injection of Dr. Churg's hearsay litigation opinions.

D. The Injection of Dr. Churg's Litigation Testimony Would Have Been Cumulative

Petitioner's claim of prejudice in the exclusion of Dr. Churg's deposition testimony (that the Kent filter could cause mesothelioma) is completely undermined by plaintiff in her petition for cert.: "Dr. Cugell was plaintiff's critical proximate cause witness and testified that the Kent asbestos filter caused Mr. Braun's mesothelioma." (Petition for cert., p. 28) The admission of Dr. Churg's deposition testimony would therefore have been cumulative relative to Dr. Cugell's testimony. The Seventh Circuit clearly recognized the same, stating:

> To permit Dr. Cugell to have repeated Churg's testimony might well have been overkill, without a collateral inquiry, which might have confused the jury and would certainly have protracted the trial, into the scientific basis of that testimony.

84 F.3d at 239.

The District Court's evidentiary rulings are to be reviewed under the abuse of discretion standard and, in particular, the extent to which a party may respond to "unfair" inferences is within the discretion of the District Court. *United States v. Martinez,* 988 F.2d 685, 702 (7th Cir. 1993). Petitioner's complaints about the cross-examination and redirect examination of Dr. Cugell are insufficient to establish an abuse of discretion, or to obtain review by a writ of certiorari.

IV. CONCLUSION

For the reasons set forth above, Respondent Lorillard, Inc. respectfully requests that this Court deny Petitioner's petition for a writ of certiorari.

Respectfully submitted,

WILLIAM S. OHLEMEYER
ROGER C. GEARY
MARCUS A. MOLLISON
SHOOK, HARDY
& BACON, L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
(816) 474-6550

Attorneys for Respondent Lorillard, Inc.

LORILLARD'S APPENDIX

**[Excerpts From Transcript Of Proceedings in
The United States District Court
For the Northern District of Illinois, Eastern Division]**

Schwartz - voir dire by Ohlemeyer 1051

* * *

THE COURT: You may voir dire.

VOIR DIRE EXAMINATION

BY MR. OHLEMEYER:

Q. Dr. Schwartz, let's talk only about lung tissue.

You have never previously examined lung tissue for this asbestos content?

A. Correct.

Q. And you have never previously taken lung tissue specimens and prepared them yourself or instructed somebody else how to prepare them for analysis under the microscope?

A. With regard to asbestos?

Q. Asbestos.

A. No, correct.

Q. And this Mr. – your analyst, Mr. Lov?

A. Yes.

Q. He had never previously done that before, had he?

A. No, he had not.

Q. And in fact, while all of this was going on, you weren't even in Chicago, were you?

A. That's true.

Q. You were out of town?

A. Yes.

Q. And before, when your laboratory got the lung tissue, before you told Mr. Lov what to do – and by the way,

there are no written instructions of what you told Mr. Lov to do with the tissue, are there?

Schwartz - voir dire 1052

A. No.
Q. Before you told Mr. Lov what to do, you didn't go to any textbooks or read any medical literature about tissue analysis for its asbestos content?
A. No, I did not.
Q. And you didn't consult any resources or any other people in the field who have done that type of work to ask them about the protocol or the methodology you could use to prepare that tissue?
A. No, I did not.
Q. And in fact, at the time Mr. Swartzman, who is Mr. Schoenfield's partner, first talked to you about this subject, you were aware or you assumed that there were published instructions for how to do this somewhere out in the literature, weren't you?
A. I assumed they were in existence somewhere.
Q. And if you had wanted to find them, you know how you can find that type of information, don't you?
A. Yes.
Q. But actually, Mr. Swartzman asked you specifically to think about this in a different way, didn't he?
A. He, I believe, asked me what are the different ways one might prepare tissue for this type of analysis.

Schwartz - voir dire 1053

Q. Well, didn't he specifically ask you how would you do this if you had to do it in a different procedure where you don't deal with tissue sections or other more routinely prepared methodology?
A. Yes, I believe so.

Q. And in fact, the methodology that you used is the one you used for ceiling tiles or asbestos insulation, building materials?
A. Yes.
Q. And you are familiar, aren't you, Dr. Schwartz, with the scientific literature or reports that suggest that when you dry tissue like you did, where you ash it, that basically is baking it, isn't it?
A. Yes.
Q. That when you dry it, that has the – that can break fibers and actually increase the number of fibers you see under the microscope?
A. I would not say the drying procedure by itself, but the overall manipulation of tissue through the processes may have a tendency to do that, yes.
Q. Well, do you remember we took your deposition on the 23rd of October, and Mr. Schoenfield was there, and I was there, the court reporter was there, do you remember?
A. Yes.
Q. And you were under oath, and I asked you questions and Mr. Schoenfield asked you questions?

A. Yes.
Q. And you remember – page 51, counsel, I asked you this question and do you remember this answer: "Are you familiar with any literature or investigation which suggests that drying of tissue and subsequent ashing are as a rule to be avoided because the procedure appears to break fibers and hence spuriously increase their numbers?" And your answer was: "It can happen, yes, I'm aware."
A. Yes, that's my testimony. But I think that's somewhat out of context of discussing methodologies in gen-

eral; or if that wasn't discussed, what my experience is when dealing with these methodologies.
Q. We also talked about chemical analysis, the chemistry, the EDAX I think you called it.
A. Yes.
Q. And that's the equipment that allows you to determine that what you are looking at is actually asbestos or specifically a specific type of asbestos as opposed to another type?
A. Correct.
Q. And in the instructions that you gave to Mr. Lov or in the procedure that he used, at some point he introduced some acid into the procedure, didn't he?
A. Yes.
Q. And you agree with me, don't you, Doctor, that high temperatures and acid can affect the chemistry of asbestos and other minerals?

Schwartz - voir dire 1055

A. In combination.
Q. And in fact, you used high temperature and acid – or Dr. Lov used high temperature and acid in combination with preparing this tissue for analysis under microscope?
A. In sequence, not in combination,
Q. And do you remember this question –
A. Which is different.
Q. Okay. But let me ask you if you remember this question and this answer, Doctor. Page 84, counsel, line 1.

"QUESTION: High temperatures and acid can affect the chemistry of asbestos and other minerals?

"ANSWER: Yes. It can solubilize and remove elements from the fibers and therefore make chemical analysis or x-ray analysis inconclusive."

A. Yes, again in combination.

Q. And the next question I asked was: "Would that be a reason not to use high temperatures or acid in this type of protocol?" And your answer was, "In combination, high temperatures and acid conditions, if you were looking for a small number of things." My question, "Which is exactly what you were doing?" Your answer is "Yes."
A. Yes.

* * *

Schwartz - voir dire 1064

* * *

Q. Before you did any work in your laboratory or before Mr. Lov did any work in the laboratory in this case, you were aware there are established methods for preparing lung tissue for TEM analysis, correct?
A. No, I was not aware that there was any established methods.
Q. Well, let me read to you from page 51 line 23 –

"And do you know whether there are preferred or prescribed methods for preparing lung tissue for mineralogic analysis?

"ANSWER: I can imagine that somebody has a method, that has published a method for tissue that gives a certain reproducibility that exists somewhere. Maybe a number of methods."

And then the question was: "If you had more time, is that something that you might have tried to research or investigate?"

Schwartz - voir dire 1065

A. Yes.

* * *

Q. Do you agree, Dr. Schwartz, that the so-called bleached digestion method is a customary – is a method of lung tissue – of preparation of lung tissue for fiber burden analysis that's customarily relied upon by people who did this?
A. I didn't know it at the time, no.
Q. Do you know it today?
A. I'm actually not sure of that fact yet.
Q. You haven't had a chance to research it yet?
A. And nobody has asked me to evaluate the methodologies.
Q. Do you agree that the low temperature plasma ashing method is a method of preparing lung tissue for fiber burden analysis customarily relied upon by experts who do this routinely?
A. The first part of the question, am I aware – was I aware of that?
Q. I'm sorry. The question is: Do you agree with that proposition?
A. I do not know, sir.
Q. You haven't had a chance to research that literature either?

Schwartz - voir dire 1066

A. Correct.
Q. And do you agree that high temperature ashing is – of lung tissue to prepare it for TEM analysis is not a method customarily relied upon by experts who do fiber burden analysis?
A. Again, I have no knowledge of it until I have a chance to review all of the literature.

* * *

Schwartz - voir dire 1073

* * *

THE COURT: But he's also testified that he really didn't have any knowledge of the methodology that should be employed with respect to lung tissue. It seems to me this witness knows absolutely nothing about analyzing lung tissue and asbestos fibers.

MR. SCHOENFIELD: He knows about analyzing –

THE COURT: And additionally he acknowledged that the methodology that he used – he just – he had no answers. He didn't know one way or the other.

* * *

Schwartz - voir dire 1074

* * *

THE COURT: I'm convinced that my ruling is right, counsel. And somebody certainly at some point in time may second guess me; but at this point, I stand by the ruling. The objection will be sustained.

Cugell - direct 1325

* * *

Q. Doctor, did you receive the records of – did you receive pathology records diagnosing mesothelioma in this matter?

A. Yes.

Q. Did you receive records from Northwestern Memorial Hospital?

A. Yes.

Q. Did you receive Rush Presbyterian - St. Luke's Medical Center records?

A. Yes.

Q. Did you receive Brigham & Women's Hospital records?

A. Yes, I did.

Q. By the way, where is Brigham & Women's located?

A. Boston.

Q. Did you receive medical records from Ontario Medical Associates?
A. Yes.
Q. Did you receive an operative note of a right extra pleural pneumonectomy from Brigham & Women's Hospital?
A. Yes, I did.
Q. Did you receive statements from Dr. Paul Epstein?
A. Yes.
Q. Did you receive statements from Dr. Andrew Churg?

A. Yes, I did.
Q. Did you receive correspondence and a report dated in 1991 from Materials Analytical Services?
A. Yes.
Q. Did you receive statements from Dr. Longo?
A. Yes.
Q. Did you receive a series of correspondence in 1953 and 1954 between Lorillard and certain of its consultants?
A. I did.
Q. Did you receive copies of –
MR. JOHNSON: Strike that.
BY MR. JOHNSON:
Q. Did you receive a statement from Douglas Hallgren?
A. Yes.
Q. Did you receive a statement of Dr. Alexander Spears?
A. Yes
Q. Doctor, based on the information that you have and the experience that you've had in this field, do you have an opinion to a reasonable degree of medical certainty as to whether the late Norman Braun suffered from an asbestos-related disease?
A. Yes, I do.

Q. What is that opinion?
A. He clearly had mesothelioma.

Cugell - cross by Hardy 1370

BY MR. HARDY:
Q. Okay.

I want to talk first, Doctor, with you about people whom you would recognize as an authority on asbestos disease fiber types, potential of fiber types to cause disease.

Would you recognize Drs. Andrew Churg and Victor Roggli and J.C. Wagner in that category?
A. Yes.

* * *

Q. Those are people to whom you would defer with respect to those two topics I mentioned, specially; that is, determination of fiber type and potential to cause disease?
A. Yes.

* * *

Cugell - cross by Hardy 1391

Q. In fact, when mesothelioma patients with exposure to amphibole asbestos have their lung tissue examined by transmission electron microscopy, would you agree that they often show an increase — or excuse me, would you agree that they do show an increase of 250 fold in amphibole asbestos as compared to the background of the general population?
A. Well, as an extremely broad range, that's an average of a very wide range of numbers. It's equally definite that some people with mesothelioma have a very, very low or almost immeasurable level of amosite or crocidolite asbestos in their lung. I think that's clear in the work of Churg that we previously mentioned.

Cugell - cross by Hardy 1392

Q. You say Churg found –

A. Look on Table 7.7 in his textbook, he gives a range of fibers, concentrations that go from practically nothing to relatively high values in people with mesothelioma.

* * *

Cugell - cross by Hardy 1397

Q. Now, when fiber quantity experts, that is the people we've been talking about like Churg, Roggli, Pooley, Wagner, the people who do the fiber burden analyses, when they do that and report their tests on fiber amounts and types, they are usually talking about asbestos in lung tissue as opposed to tumor, isn't that right?

A. Well, you never analyze tumor for fibers because they're not present. It's generally widely accepted –

Cugell - cross by Hardy 1398

Q. Sure.

A. – that the only tissue on which significant measurements can be made is the lung, not tumor.

Q. Sure. And because of the kind of background exposure that the general population has, it's critically important to determine quantity or amount when you're looking at lung tissue?

A. It's desirable, yes.

Q. Well, in fact, would you agree with the statement that it is of no real value to simply show that asbestos is present, that you must instead in doing fiber analysis on tissue from someone who has a disease that may be related to asbestos figure out how much asbestos is in the lung. That's absolutely essential, isn't it?

A. Well, it depends. I mean, if you want to make a diagnosis of asbestosis, for example, there are criteria that are very rigorous that assure a diagnosis without necessarily

defining in numerical – the numerical definition of the fibers that are present.

But whenever there's a question of an asbestos-related disease process, then it's clearly desirable to have as clear and precise as possible counts of the fiber concentration in the lung tissue, yes.

Cugell - cross by Hardy 1399

Q. You wouldn't be surprised if Dr. Churg said it was critically necessary to determine not only whether there is asbestos in the lung, but what type and how much if you want to make a diagnosis?

A. Andy Churg is a fiberologist, that certainly wouldn't surprise me if he made that claim and statement.

* * *

Cugell - cross by Hardy 1401-1402

Q. Doctor, I'll show what's been marked as Defendants' Exhibit 133. I refer you to the third page of that exhibit first. Do you recognize that as a chapter from The Lung written by Dr. Churg?

A. Yes.

Q. And of course the publication itself, The Lung, is one you're familiar with too, isn't it?

A. That's a textbook, yes.

Q. And referring to page 1878 –

A. Yes.

Q. – and you see at the top of the second column where it says "asbestos appears"?

A. Yes.

Q. Could you read that? Would you read that sentence?

A. "Asbestosis appears at a much higher lung burden than does pleural mesothelioma, and mesothelioma appears at higher lung burdens than do benign pleural

changes such as plaques. Finally and most importantly, asbestos disease appears at lung burden some 2 to 3 orders of magnitude greater than that found in the general population."

Q. And do you agree with that statement that mesothelioma appears at higher lung burdens than do benign pleural changes such as plaques?

A. Well, I haven't read the preceding part of this chapter, but it depends on what fiber types you're talking about. In my opinion, I think the crocidolite cause for – if your only exposure is to crocidolite, your likelihood of getting mesothelioma in the absence of plaques is quite high. If you're exposed to amosite and chrysotile, then the reverse is correct.

Cugell - cross by Hardy 1403

Q. So if Dr. Churg is talking about asbestos, you'd disagree with him as to certain fiber types?

A. Yes.

Q. By the way, just look on down the page there where I've highlighted a couple of sentences. Do you see those?

A. Yes.

Q. Read that, would you, please?

A. "It is important to point out that some persons with mesothelioma have no history of asbestos exposure; moreover, analysis of lung content fails to show increases over background, a finding that supports the proposition that some proportion of mesotheliomas are unrelated to asbestos exposure."

Cugell - voir dire by Hardy 1439

MR. HARDY: Doctor, do you agree that it's not customary for physicians in the practice of medicine to rely upon deposition testimony of other physicians in

order to form opinions – in forming opinions about the health or ill health of individuals?

THE WITNESS: It is not customary to rely on it, no.

Cugell - redirect 1444

THE COURT: I think what you can do, counsel, is to elicit from him that he did rely upon the statements received from Dr. Churg in formulating his opinion. He has already given his opinion, and I think that should suffice. I think to bring in that Dr. Churg agrees with him, it seems to me that even if I give a limiting instruction, I think it could be – I think the prejudicial effect outweighs the probative value of letting that in, assuming even that it should come in, and I'm not convinced that it should come in. You may elicit from him that he did utilize Dr. Churg's opinion or statement.

* * *

Cugell - redirect 1450

BY MR. JOHNSON:

Q. Dr. Cugell, among the materials that you relied upon in forming your opinion was the statement by Dr. Andrew Churg of Vancouver, British Columbia, is that correct?

A. Yes, sir.

Q. And that's the same Dr. Andrew Churg who wrote some of the articles that you were asked about on cross?

A. That's correct.

Q. Did you rely on that statement by Dr. Andrew Churg as one of the bases for your forming your opinion that you've expressed to the jury today?

A. Yes.

Q. Doctor, as a result of the cross-examination that you've experienced with Mr. Hardy and Mr. McElaney,

do you wish [sic] change any of the opinions that you've expressed regarding the causation of Mr. Braun's mesothelioma?
A. No.

* * *